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In The
Supreme Court of the United States

October Term 1999

WALTER DEERING,
As personal representative of the Estate of Reinhold Deering,

Petitioner,

v.

JAMES M. REICH,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This action was brought pursuant to 42 U.S.C. § 1983 by Petitioner Walter Deering, in his capacity as personal representative of the estate of Reinhold Deering, for damages arising from the death of Reinhold Deering ("Deering"). The events in question occurred on the night of February 1, 1995, when Respondent James M. Reich, Paul D. Schnasa, and

Michael J. Wizner, officers employed by the Shawano (Wisconsin) County Sheriff's Department, attempted to serve an arrest warrant upon Deering. Shortly after Deputies Reich and Schnasa announced their presence at Deering's residence, Deering appeared at the door with a firearm. Deering subsequently fired a shot at Deputy Wizner. Moments later, Deering pointed his firearm at Deputy Reich and ignored Reich's command to drop his weapon. Reich then shot and killed Deering.

The Petitioner's Amended Complaint alleged that Reich had not acted reasonably in his use of deadly force against Deering, in violation of Deering's Fourth Amendment right to be free from unreasonable seizure.[1] A jury trial was held on June 1-8, 1998. The jury returned a verdict finding no liability on the part of Reich and awarding the Petitioner nothing as damages. Judgment on the verdict was entered on June 8, 1998.

On appeal, the Petitioner raised several issues before the United States Court of Appeals for the Seventh Circuit. One of these issues, and the only one presented to this Court in the Petition for Writ of Certiorari, concerns an evidentiary ruling made by the District Court during trial and a portion of the instructions given to the jury.

During trial, the District Court sustained Reich's

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1 Additional claims were asserted against Deputies Schnasa and Wizner and against Shawano County. These claims were dismissed by the District Court on summary judgment and all Defendants other than Reich were dismissed from the action. Only the Fourth Amendment claim against Deputy Reich was preserved for trial.

objections to the introduction of testimony concerning the nature of the crime (felony v. misdemeanor) supporting the arrest warrant that Reich was attempting to serve on Deering on the night in question. The District Court also instructed the jury that "the reasons for issuing the arrest warrant for Reinhold Deering's arrest are irrelevant." The District Court further instructed the jury that "the warrant did not require service at any particular time of the day or night."

Before the Seventh Circuit, the Petitioner argued that this evidentiary ruling and the content of the quoted jury instructions constituted reversible error requiring a new trial. Petitioner argued that these decisions rendered the jury incapable of assessing the "totality of the circumstances" surrounding the seizure of Deering.

The Seventh Circuit, in a decision dated July 1, 1999, held that the challenged evidentiary ruling, although a "bit restrictive and for that reason troubling," did not require a new trial. *Deering v. Reich*, 183 F.3d 645, 652 (7th Cir. 1999). The Seventh Circuit noted that the jury was permitted to hear evidence regarding the incident giving rise to the arrest warrant and the time and manner in which the deputies attempted to serve the warrant. *Deering*, 183 F.3d at 652. The court held that because the jury was permitted to hear "in general about the totality of the circumstances," the decision to exclude evidence concerning the misdemeanor nature of the crime charged in the arrest warrant was not reversible error. *Deering*, 183 F.3d at 652.

With respect to the portion of the challenged jury instruction stating that "the reasons for issuing the arrest warrant for Reinhold Deering's arrest are irrelevant," the

Seventh Circuit determined that this was a "misstatement" by the District Court. *Deering*, 183 F.3d at 653. However, the Circuit Court, after considering the jury instructions as a whole, held that the jury was properly instructed to consider the totality of the circumstances known to Reich at the time of the seizure. *Deering*, 183 F.3d at 653. The court held that "The instructions viewed as a whole allow a consideration of what Reich knew about Deering as well as what the situation was at the moment he fired." *Deering*, 183 F.3d at 653. Because the instructions as a whole properly informed the jury of the applicable law, the misstatement by the District Court was held not to require a retrial of the case. *Deering*, 183 F.3d at 653.

With respect to the portion of the challenged jury instruction stating that "the warrant did not require service at any particular time of day or night," the Seventh Circuit held that the statement was true and was not given in error. *Deering*, 183 F.3d at 653.

STATEMENT OF FACTS

On January 31, 1995, Shawano County (Wisconsin) Circuit Court Judge Thomas G. Grover issued a bench warrant for the arrest of Deering on the grounds that he failed to appear at an initial appearance on that date in State v. Deering, 95-CR-00001, a misdemeanor criminal case which was pending against him. (R. 36, Exh. H; R. 86 at 4.)[2] The warrant was transmitted to the Shawano County Sheriff's Department,

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2 The Respondent recognizes that the record has not yet been filed with the Court. Respondent will nonetheless support his factual recitations with citations to the record.

located in the City of Shawano, Wisconsin.

The crime with which Deering was charged was misdemeanor property damage stemming from an incident in which Deering backed his vehicle into a parked motorcycle, tipping it over. *Deering*, 183 F.3d at 648.[3]

Deputy Wizner commenced work at approximately 4:00p.m. on the evening of January 31, 1995. (Tr. 300.)[4] His shift was scheduled to end at 1:00 a.m. on February 1, 1995. (Tr. 302.) After he commenced his shift, Deputy Wizner reviewed the pending arrest warrants, including the warrant for Deering. (Tr. 300.) Subsequently, he traveled to Deering's residence to ascertain its location. (Tr. 301.)

At approximately 6:00 p.m. on January 31, 1995, Deputy Schnasa commenced his tour of duty. (Tr. 302.) He was scheduled to conclude his tour of duty at 3:00 a.m. on February 1, 1995. (Tr. 303.) At approximately 11:00 p.m. on January 31, 1995, Corporal Reich commenced his tour of duty. (Tr. 303.) He was scheduled to conclude his tour of duty at

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3 The Respondent objects to the Petitioner's references throughout the Petition to the allegation that he was precluded from introducing evidence of "the pettiness of the underlying crime." The Seventh Circuit specifically held that the jury "heard evidence about the incident with the motorcycle..." *Deering*, 183 F.3d at 652. What the jury was precluded from hearing was that the arrest warrant "was based on a misdemeanor." Deering, 183 F.3d at 652.

4 As used herein, citations to the Trial Transcript will be made as "Tr." followed by the page number.

8:00 a.m. on February 1, 1995. (Tr. 303.)

Sometime after 11:00 p.m., Corporal Reich, Deputy Schnasa, and Deputy Wizner met in the Dispatch Center and discussed the service of the pending warrants, including the one issued for Deering. (Tr. 319.)

At approximately 12:45 a.m. on February 1, 1995, Deputies Reich, Schnasa, and Wizner arrived at Deering's residence. (Tr. 322.) Deputy Schnasa knocked on Deering's door on the north (back) side of Deering's house. (Tr. 621-622.) Looking through a bedroom window at the back of the house, Corporal Reich saw Deering sleeping and told Deputy Schnasa to knock again louder. (Tr. 449, 342.) Corporal Reich then saw Deering get out of bed and travel to the door. (Tr. 456.) Corporal Reich told Deputy Wizner (who was standing on a pile of dirt between the back door and the bedroom window) to keep an eye on Deering since he (Deering) was going to the back door. (Tr. 449-450.) Corporal Reich then went to the porch in front of the door. (Tr. 457.)

Deering came to the door and the curtains on the door opened slightly. (Tr. 623.) Deering said words to the effect of "Who's there?" (Tr. 463, 623.) Corporal Reich and Schnasa said that it was the Sheriff's Department. (Tr. 540.) Deputy Schnasa shined his flashlight on his badge. (Tr. 624.) Corporal Reich shined his flashlight over his uniform. (Tr. 540.)

Either immediately before or after the curtains shut, Deering said words to the effect of "Goddamn Sheriff's Department." (Tr. 541, 623-624.)

The curtains then parted again, and Deputy Schnasa

heard rustling behind the door and heard the ping of something hit the window. (Tr. 624.) Deputy Schnasa observed four inches of a the barrel of a long gun, which he assumed was a shotgun or rifle. (Tr. 624.) Corporal Reich also observed a barrel of a long gun between the curtains and heard the object click on the glass. (Tr. 541.) Deputy Schnasa and Corporal Reich yelled "gun." (Tr. 541, 626.)

Deputy Schnasa ran to the east to the squad cars and advised dispatch on the radio that Deering had a gun. (Tr. 630.) Deputy Wizner ran to the northwest corner of the house. (Tr. 366.) Corporal Reich ran in a northwesterly direction towards a big shed that was north of the house. (Tr. 542.)

From his location at northwest side of the house, Deputy Wizner shined his flashlight on Deering two or three times and observed that Deering was standing partially in the doorway with a gun. (Tr. 360.) Each time that Deputy Wizner shined his light on Deering, Deering pointed a gun at him. (Tr. 360.) Deputy Wizner told Deering to "drop the gun." (Tr. 370.) On one occasion when Deputy Wizner ducked behind the house, Deputy Wizner observed that Deering moved away from the house and into the yard. (Tr. 370-371.) Deputy Wizner shined his flashlight on Deering and yelled at Deering to drop his gun. (Tr. 388.) Deering then stopped, turned and fired a shot in the direction of Deputy Wizner. (Tr. 388-389.)

Deputy Wizner believed that he had been hit. (Tr. 396.) Deputy Wizner then got up and ran to the area where the squad cars were located. (Tr. 392.)

Corporal Reich heard Deputy Wizner yell at Deering to put down his weapon. (Tr. 545.) Corporal Reich saw a bright

orange flash and heard a noise that sounded like a shotgun. (Tr. 542-543.) Reich saw a flashlight in Deputy Wizner's position go down, and then back up. (Tr. 544.) Corporal Reich believed that Deputy Wizner had been shot. (Tr. 544-545.) In fact, Deputy Wizner had not been hit.

When the shot was fired, Corporal Reich could not see Deering. (Tr. 543.) Reich moved forward a couple of steps to get Deering in his sight, and Reich saw Deering in the lighted area of the yard. (Tr. 543-544.)

Corporal Reich illuminated Deering with a flashlight. (Tr. 543-544.) Corporal Reich saw that Deering was facing him with a long gun at his (Deering's) shoulder, bringing it up into a firing position, pointed at Reich. (Tr. 503, 546.) Reich saw that Deering's body was bladed, meaning that Deering's left hip was pointed in Reich's direction. (Tr. 546.) Reich yelled at Deering to put the gun down. (Tr. 545.) Reich believed that his life was in danger. (Tr. 547.) Reich dropped his flashlight and fired at Deering, believing that Deering was going to fire and kill him. (Tr. 519, 547.) Deering was killed.[5]

REASONS FOR DENYING THE WRIT

The Petitioner has alleged that the Petition should be granted because (1) the decision of the Seventh Circuit is in

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5 Respondent objects to the Petitioner's pejorative factual assertion that Deering was "shot in the back." Testimony at trial from an expert forensic pathologist indicated that Deering's wounds were consistent with a position in which he was aiming a shot gun at Reich at the time he was shot. (R. 177, Transcript of testimony of Dr. Virginia Greenbaum at pp. 42-43).

conflict with this Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); and (2) the decision of the Seventh Circuit creates or exacerbates a conflict among the circuits regarding evidence relevant to an examination of the totality of the circumstances in a Fourth Amendment "unreasonable use of force" case. Neither position has merit.

In fact, the Seventh Circuit took the precise positions on the law advocated by the Petitioner, but held that any errors committed by the District Court at trial were *harmless* under the unique factual circumstances of this case. The Seventh Circuit's decision is therefore dependent on the unique facts in this case, rendering Supreme Court review unnecessary and inappropriate.

As an initial matter, the Respondent must make clear that he does not agree with several rulings made by the Seventh Circuit. As argued before the Seventh Circuit, the Respondent believes that the District Court's decision not to permit testimony regarding the misdemeanor nature of the crime with which Deering was charged was not an abuse of discretion and was consistent with the applicable law. Similarly, Respondent believes that the District Court's jury instruction regarding the irrelevancy of the reasons for the issuance of the arrest warrant was consistent with applicable law. If the Petition for Writ of Certiorari were to be *granted*, Respondent reserves the right to once again make these arguments.

However, Respondent's disagreement with these aspects of the Seventh Circuit's decision do not impact the question of whether this case is appropriate for the issuance of a Writ of Certiorari. For the following reasons, it is requested

that the Writ be denied.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The Petitioner correctly observes that excessive force claims, including deadly force claims, resulting from a seizure are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 396. This standard requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The question is whether the "totality of the circumstances" justify the particular type of seizure involved. *Tennessee v. Garner*, 471 U.S. at 8-9.

The Petitioner goes on to argue that the misdemeanor nature of the crime underlying the arrest warrant forms a part of the "totality of the circumstances" surrounding the seizure of Deering. Where the Petitioner's argument goes awry in its characterization of what the Seventh Circuit's decision *actually held*. In fact, the Seventh Circuit agreed with the Petitioner's position on this question.

Reading the Petition, one might get the impression that the Seventh Circuit must have *agreed* with the District Court's position that the misdemeanor nature of the warrant was not relevant to assessing the totality of the circumstances. Just the opposite is true. The Seventh Circuit held that such information was in fact relevant:

> These cases -- and others too numerous to relate -- mean that what Deputy Reich knew at the time – about Deering, his crime, and the warrant, and the perception of the danger he and the other deputies were in – were relevant to the evaluation of the reasonableness of his conduct.

Deering, 183 F.3d at 652.

This is precisely the position on the law advocated by the Petitioner. The Seventh Circuit held that the misdemeanor nature of Deering's crime formed a part of the totality of the circumstances, and the court clearly disagreed with the District Court's decision not to permit testimony regarding the misdemeanor nature of the arrest warrant:

> It is troubling to us that the instructions and the evidentiary rulings take a rather restrictive view of what constitutes the totality of the circumstances.

Deering, 183 F.3d at 649.

In so doing, the Seventh Circuit clarified that "pre-seizure" information known to an officer is relevant to an assessment of the reasonableness of his or her conduct. Despite its disagreement with the District Court's ruling, the Seventh Circuit held that in the *unique factual circumstances of this case*, the District Court's "restrictive" rulings did not warrant a new trial because the jury was permitted to hear sufficient evidence to make the reasonableness determination:

> Despite that [evidentiary ruling], however, the jurors heard evidence about the incident with the motorcycle, which would allow them to understand that the deputies were not looking for a serial murderer when they went to the farmhouse. The jury also heard testimony regarding how the deputies approached the house, how dark it was, what Deering's response was. They were allowed to hear sufficient information about the situation. Because the jury knew in general about the totality of the circumstances, the fact that they did not hear that the warrant was based on a misdemeanor is not reversible error – though we fail to see why this fact was kept from the jury.

Deering, 183 F.3d at 652 (emphasis added).

There is consequently no conflict between the Seventh Circuit's decision and the reasonableness test established in *Graham* and *Tennessee v. Garner*. The Seventh Circuit held that the jury should be permitted to assess the totality of the circumstances known to the officer at the time of the seizure. This holding is entirely consistent with applicable Supreme Court precedent. The court's determination that the evidentiary ruling did not require a new trial was based entirely on the unique factual circumstances of this case and the court's thorough assessment of the evidence that was actually admitted.

In reality, the Petitioner's disagreement with the Seventh Circuit stems not from the court's holdings on questions of constitutional law, but with the court's assessment of the evidence. The fact that the contested holding involves a case-specific assessment of the totality of the evidence admitted at trial renders this case inappropriate for review by the Supreme Court.

The same is true of the Seventh Circuit's holding with respect to the contested jury instruction. Contained within lengthy jury instructions was the brief statement that the "reasons for issuing the warrant for Reinhold Deering's arrest are irrelevant." Based on the applicable "totality of the circumstances" test, the Seventh Circuit held that this instruction was not proper. *Deering*, 183 F.3d at 653. However, the Seventh Circuit correctly noted that in determining whether a new trial was warranted, it must not view this instruction in isolation. The court is required to consider "the instructions as a whole, ... the opening statements, the evidence, and the closing argument to determine if the jury was adequately informed of the applicable law." *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 387-388 (7th Cir. 1985), cited in *Deering*, 183 F.3d at 653.

Considering the jury instructions as a whole, the Seventh Circuit held that the jury was *properly instructed* regarding the applicable law when told to consider "all the circumstances and the information available to the officer at the time." *Deering*, 183 F.3d at 653. The District Court's "misstatement," taken in context of the jury instructions as a whole, was held not to require a new trial. *Deering*, 183 F.3d at 653.

Once again, there is no conflict between the Seventh Circuit's holding on the jury instruction issue and any applicable principle of constitutional law. The contested holding is based on the court's case-specific assessment of the jury instructions that were actually given by the District Court. Such a holding is bound up with the unique facts of this case and does not require review by the Supreme Court.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS.

Petitioner next argues that there exists a conflict among the circuit courts as to whether all facts and circumstances known to an officer regarding a plaintiff, including facts learned prior to the actual seizure, should be relevant to an assessment of reasonableness of a seizure. Petitioner relies on statements made in Abraham v. Raso, 183 F.3d 279 (3rd Cir. 1999), in contending that a conflict exists. In reality, the cases with which the Abraham court purported to disagree are distinguishable, and there is no conflict among the circuits on this issue and no need for the Supreme Court to clarify the law.

In the instant case, the Seventh Circuit held that "what Deputy Reich knew at the time – about Deering, his crime, and the warrant" were relevant to the evaluation of the reasonableness of his conduct. *Deering*, 183 F.3d at 652. The Seventh Circuit took the position that in assessing the reasonableness of a seizure under the Fourth Amendment, the trier of fact must consider "a number of factors known to the officers at the time [of the seizure]." *Deering*, 183 F.3d at 651. Stated another way:

> The totality of the circumstances cannot be limited to the precise moment when Deering discharged his weapon.

Deering, 183 F.3d at 649.

A similar conclusion was reached by the Third Circuit in *Abraham*, in which it was held as follows:

> 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Abraham, 183 F.3d at 291.

These formulations of the rule are consistent with the holding of this court that the question is "whether the totality of the circumstances justifie[s] a particular sort of seizure." *Tennessee v. Garner*, 471 U.S. at 8-9; *Graham*, 490 U.S. at 396.

In reaching its conclusion, the *Abraham* court purported to disagree with *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994), and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).[6] The Third Circuit characterized the holdings in these cases as precluding the consideration of "pre-seizure conduct" in assessing the reasonableness of seizures under the Fourth

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6 The *Abraham* court also purported to disagree with *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992). In deciding the present case, the Seventh Circuit explained and clarified its holding in Carter not to conflict with its holding in this matter. *Deering*, 183 F.3d at 650.

Amendment. *Abraham*, 183 F.3d at 291. A close reading of these cases reveals that they are entirely compatible with *Abraham* and the Seventh Circuit's holding in this case.

In *Bella*, the plaintiff was piloting a helicopter that was being pursued by law enforcement agents. During the course of the pursuit, an officer fired three rounds from a semiautomatic weapon at the plaintiff's helicopter, one of which struck the helicopter but did not disable it. *Bella*, 24 F.3d at 1253. Approximately an hour later, the plaintiff landed the helicopter, at which time he was taken into custody. *Id.*

Importantly, the plaintiff in *Bella* did *not* challenge the officer's conduct in effecting his arrest. *Bella*, 24 F.3d at 1256. The only actions of which the plaintiff complained were the firing of the weapon by the officer and the fact that the pursuing helicopter was flown dangerously close to his own during the pursuit. *Bella*, 24 F.3d at 1253.

The Tenth Circuit held that the actions of which the plaintiff complained did not amount to a "seizure" within the meaning of the Fourth Amendment.[7] *Bella*, 24 F.3d at 1256. Because the plaintiff had only alleged misconduct on the part of the officers for actions taken prior to the seizure (his arrest), and had not alleged that the seizure itself was unreasonable, the court held that his complaint *failed to state a claim* under the Fourth Amendment. *Bella*, 24 F.3d at 1256. In the absence of

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7 The *Bella* court relied on this Court's holding in *California v. Hodari D.*, 499 U.S. 621, 626-627, 111 S.Ct. 1547, 1550-1551, 113 L.Ed.2d 690 (1991), that a "seizure" occurs only when a fleeing person is physically touched by police or when he or she submits to a show of authority by police.

a challenge to the actual seizure, the court properly found it unnecessary to examine the events leading up to the seizure for reasonableness. *Bella*, 24 F.3d at 1256.

The holding in *Cole v. Bone* is to the same effect. In that case, plaintiff's decedent ("plaintiff") drove his truck through a toll booth and was subsequently pursued at high speed by numerous state troopers. In the course of the pursuit, several troopers attempted to slow plaintiff's vehicle by firing at the tires, executing a "rolling roadblock," establishing a stationary roadblock, and other means, none of which were successful in stopping the vehicle. *Cole*, 993 F.3d at 1330-1331. One trooper finally decided to use deadly force to stop the vehicle, and his shots into the truck struck and killed the plaintiff. *Cole*, 993 F.3d at 1331.

Plaintiff alleged that he was "seized," within the meaning of the Fourth Amendment, when troopers attempted to stop his vehicle by means of the rolling and stationary roadblocks. *Cole*, 993 F.2d at 1332. Relying on *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the Eighth Circuit held that those actions *did not amount to a seizure*, and that the plaintiff was not "seized" until he was struck by the fatal shots. *Cole*, 993 F.2d at 1333.

As a consequence, the court held that plaintiff had *failed to state a claim* under the Fourth Amendment against those troopers who had not participated in the actual seizure. *Cole*, 993 F.2d at 1333. The court held that *in the absence of a cognizable "seizure,"* a court should not examine events leading up to the seizure for reasonableness under the Fourth Amendment. *Cole*, 993 F.2d at 1333. In other words, "pre-seizure conduct," if not followed by an actual seizure, does not

state a claim for relief under the Fourth Amendment.

Importantly, the *Cole* court went on to examine the reasonableness of the conduct of the officer who actually seized the plaintiff, and against whom a claim had been stated under the Fourth Amendment. In so doing, the court stated the applicable test for reasonableness as follows:

> In analyzing the reasonableness of Trooper Rice's decision to use deadly force, we examine the information that Rice possessed at the time of his decision.

Cole, 993 F.2d at 1333 (emphasis added).

The court went on to examine all information known to the officer that he learned throughout the entire course of his contact with the plaintiff. *Cole*, 993 F.2d at 1333-1334. The court's consideration of the reasonableness of the seizure was not limited to events occurring immediately prior to the seizure.

The holdings in *Bella* and *Cole* therefore stand for the proposition that in the absence of a "seizure," the court does not examine the conduct of officers for reasonableness under the Fourth Amendment. Simply stated, without a "seizure," the conduct of officers does not state a claim for relief under the Fourth Amendment. The relevant holdings in *Bella* and *Cole* dealt with whether a seizure had occurred in the first instance, not with whether a seizure, once accomplished, was reasonable under the totality of the circumstances. These cases are not in conflict with the holdings in *Deering*, *Abraham*, *Garner*, and

Graham,[8] that in assessing the reasonableness of a seizure, the totality of the circumstances known to the officer are relevant.

The statements of the *Abraham* court notwithstanding, there is no discernable conflict among the circuits on this issue and no need for the Supreme Court to accept certiorari of this matter.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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8 See also *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994).